

IN THE MATTER OF	:	BEFORE THE
MAL JA BAEK	:	HOWARD COUNTY
T/A MORGAN INN	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 09-028N&V

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DECISION AND ORDER

On October 1, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Mal Ja Baek t/a Morgan Inn to enlarge a confirmed restaurant and beverage establishment nonconforming use through a deck for seasonal outdoor seating and for a variance to reduce the 75-foot setback from an arterial public street right-of-way to 44 feet for a deck in an RC-DEO (Rural Conservation-Density Exchange Option Overlay) Zoning District, filed pursuant to Sections 129.E and 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to complying with the notice, posting, and advertising requirements of the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioner. Susan Badra testified on behalf of the Petitioner. David Furman testified to expressing concerns about the deck, but not in opposition to the petition.

FINDINGS OF FACT

Based upon the TSR, the petition, and my site visit, I find as follows:

1. The somewhat irregularly shaped subject property is situated on the northwest corner of the Morgan Station Road intersection with MD 144 and is known as 15400 Frederick Road (the "Property"). The Property is located in the 4th Election District and is identified on Tax Map 8, Grid 116, as Parcel 116.

2. The .976-acre irregularly shaped corner Property is improved by a two-story brick, block and frame building sited close to both roads. The western area is in lawn and landscaped and a section next to the building appears to have been recently paved. To the north are a small concrete patio and a larger lawn area where the septic area is located. To the building's east, south, and west are the parking and circulation areas. These areas directly adjoin the roadbeds of MD 144 and Morgan Station Road. About 30 parking spaces are provided. Several trees dot the rear lawn area. Several more border the Property's north and west sides. The Property slopes downward from the west and northwest.

The restaurant and beverage establishment are located on the first floor of the 2,787 square foot structure. Ms. Badra testified to residing on the second floor.

3. The Proposal. The Petitioner proposes to enlarge the nonconforming restaurant and beverage establishment through the addition of a 533-square foot deck, which will be used as a seasonal outdoor dining area. The deck will be constructed on the west side of the existing building. Ms. Badra testified that many of the somewhat older patrons of Morgan Inn are smokers and that the intent of the deck is to direct the smokers to a designated area.

4. Vicinal Properties. Adjacent properties are zoned RC-DEO. To the north is Lot

1 of the Fine Property subdivision, the northern portion of which is improved with a single-family detached dwelling fronting on Morgan Station Road. The southern section appears to be used for growing landscaping plants. Across Morgan Station Road to the east are several residential lots with access to Emmaus Road. These lots are buffered from Morgan Inn by a row of evergreen trees along their rear lot lines. To the south, across MD 144, Parcels 139 and 320 are each improved with a single-family detached dwelling. To the west, Lot 3 of the Poole subdivision is improved with an older single-family detached dwelling on the western portion of the property, and some distance from the lot line shared with the Property.

5. Roads. MD 144 has two travel lanes and a variable pavement width within an 80-foot right of way. The posted speed limit is 50 MPH. Morgan Station Road has two travel lanes and about 24 feet of pavement width within a 60-foot right-of-way. The posted speed limit is 30 miles per hour. The estimated sight distance from the Morgan Station Road parking lot entrance is more than 800 feet to the north. The sight distance from the MD 144 parking lot entrance is somewhat limited in both directions. State Highway Administration traffic data sets the traffic volume on MD 144 east of 94 at 6,301 average daily trips as of 2007. The traffic volume on MD 144 west of MD 97 was 4,661 Average daily trips as of 1998.

6. Water and Sewer Service. The Property is served by private water and sewer facilities.

7. General Plan. The Property is designated Rural Conservation on the Policies Map 2000-2020. The Transportation Map depicts MD 144 as a Minor Arterial and Morgan

Station Road as a Minor Collector.

8. Zoning History. In BA Case No. 95-51N&V, the Board of Appeals confirmed a nonconforming restaurant and bar, but denied the requested enlargement.

9. The Proposal. The Petitioner introduced into evidence a revised plan for the deck depicting it as 533 square feet in size (Petitioner's Exhibit 1). According to Ms. Badra, the deck will be about 18 inches off the ground, with lattice railing on the north, east, and south sides. The south side will be eight feet high, and the north and west sides, four feet. The only entrance would be through the interior.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. Extension, Enlargement, or Alteration of Nonconforming Uses (Section 129.E)

The Hearing Authority may authorize the extension or enlargement of a nonconforming use or the alteration of a structure containing a nonconforming use, with or without conditions, provided the Petitioner demonstrates compliance with five standards.

a. That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way;

The 533-square foot seasonal outdoor deck addition will accommodate existing customers of the longstanding, nonconforming restaurant and beverage establishment and will not change the use in any substantial way, in accordance with Section 129.E.1.a.

b. That an enlargement may not exceed 100 percent of the gross floor area of structures or 100 percent of the gross acreage in the case of nonconforming land, above that which legally existed at the time the

use first became nonconforming;

The 533-square foot deck addition is slightly less than 20 percent of the existing first-floor restaurant and beverage establishment, in accordance with Section 129.E.1.b.

c. That the outdoor land area occupied by a nonconforming use may be enlarged only to provide additional parking area;

The outdoor land area occupied by the nonconforming use will not be enlarged, in accordance with Section 129.E.1.c.

d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located;

Although the deck will encroach into the 75-foot setback from the MD 144 right-of-way, I am approving the Petitioner's variance petition to reduce the setback, for the reasons discussed below.

e. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

The proposed deck to be located to the west side of the existing building will be well separated from the house to the north. Existing vegetation will screen and buffer the uses. The use will also be screened from the lots on the east side of Morgan Station Road by the existing building and vegetation. Additionally, the deck would be located a considerable distance from the dwelling to the west and buffered by substantial existing landscaping. Latticework will help screen the deck from the dwellings across MD 144 to the south. However, because an outdoor deck has the potential to generate inordinate noise levels, as a condition of approval I am requiring the Petitioner to landscape the south side of the deck that will run parallel to MD 144 with evergreen trees. Subject to

this condition, the enlargement complies with Section 129.E.1.d.

II. The Variance Request (Section 130.B.2)

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides a variance may be granted only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance complies with Section 130.B.2.a(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

Section 128.B.2 of the Zoning Regulations permits additions to noncomplying structures through the variance process. In this case, the Property is a relatively small,

irregularly shaped corner lot improved by a legally noncomplying building that encroached into the 75-foot setback from Both MD 144 and Morgan Station Road. Consequently, the impact of the two setbacks, together with the Property's small size, would cause any adjoining deck to encroach into a setback. Given the location of the noncomplying structure and the proposed request for a deck, practical difficulties arise in complying strictly with the setback regulation. Consequently, I conclude the Property's size and the location of the noncomplying structure are unique conditions causing the Petitioner practical difficulty in complying with the side setback requirement, in accordance with Section 130.B.2.a(1).

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

The restaurant and beverage establishment is a long-existing use in the neighborhood and district. The addition of small outdoor deck for seasonal use is a relatively benign expansion of a legally nonconforming use. The latticed deck will be buffered from adjacent residences by existing vegetation and distance, and through new plantings required as a condition of approval. I therefore conclude the variance will not alter the essential character of the neighborhood or district nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in accordance with Section 130.B.2.a(2).

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The practical difficulties in complying strictly with the setback regulation arise from the location of the noncomplying structure and were not created by the Petitioner, in accordance with Section 130.B.2.a(3).

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

The 533-square foot deck for seasonal outdoor dining is a reasonable size and it will encroach less into the setbacks than the existing building. Within the intent and purpose of the regulations, then, the variance is the minimum necessary to afford relief, in accordance with Section 130.B.2.a(4).

ORDER

Based upon the foregoing, it is this 12th day of October 2009, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

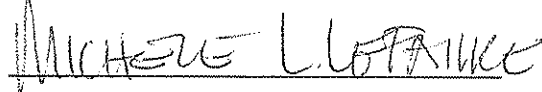
That the Petition of Mal Ja Baek t/a Morgan Inn, to enlarge a confirmed restaurant and beverage establishment nonconforming use for a deck to provide seasonal outdoor seating and for a variance to reduce the 75-foot setback from an arterial public street right-of-way to 44 feet for a deck in an RC-DEO (Rural Conservation-Density Exchange Option Overlay) Zoning District are hereby **GRANTED**;

Provided, however, that:

1. The nonconforming enlargement and variance will apply only to the land area, uses, and structures as described in the petition and plan submitted, and as amended, and not to any other activities, uses, structures, or additions on the Property.

2. The Petitioner shall plant and maintain a row of evergreen trees along the side of the deck facing MD 144.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Date Mailed: 10/15/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.